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IN THE

Supreme Court of the United States

OCTOBER TERM, 19~~62~~

No. ~~[illegible]~~ 80

WMCA, INC., R. PETER STRAUS, JOSEPH DEMAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. MCCAFFERTY,

Appellants,

v.

CAROLINE K. SIMON, Secretary of State of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, PAUL R. SCREVANE, President of the City Council of the City of New York, EUGENE H. NICKERSON, County Executive, Nassau County, LEONARD BERMAN, Chairman, Board of Supervisors, Westchester County, ARTHUR CROMARTY, Chairman, Board of Supervisors, Suffolk County, DENIS J. MAHON, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections, New York City,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 460

WMCA, Inc., *et al.*,

Appellants,

v.

Caroline K. Simon, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

Appellees' Attorney General and Secretary of State have filed a Motion to Dismiss or Affirm which cavalierly disposes of the obvious conflict between the decision below and the decisions in other cases, some of which are currently pending before this Court, with the single inaccurate statement that "all of the cited cases concern apportionments which diverge from a population standard far more widely than does New York" (Motion, p. 19).

In New York, the malapportionment infects both houses of the legislature, whereas both the Maryland (*Maryland Committee for Fair Representation* v. *Tawes*, No. 554,

Oct. Term 1962) and Michigan (*Beadle* v. *Scholle*, No. 517, Oct. Term 1962) cases relate only to the upper houses of the legislatures, the lower houses being concededly apportioned on the basis of population. Appellees' assertion, therefore, is entirely inaccurate.

Appellees devote the major portion of their Motion to statistical legerdemain at the same time asserting that Appellants' objections are matters of "mathematical nicety" (Motion, p. 14). The thrust of Appellants' case is not, however, directed at the admitted fact that apportionment in New York is not exactly proportionate to population but is rather directed at the fact that the variations are consistently and heavily in one direction to the end that six populous counties receive a far smaller proportion of the legislative seats than their numbers would otherwise entitle them to. The variations are neither minor nor accidental and never operate in favor of the most heavily populated counties. Appellants' objection, therefore, is not based upon "mathematical nicety" but rather on a consistent pattern of discrimination as a result of which there is a constantly worsening devaluation of the political representation of residents of these counties.

We have heretofore (J. St., p. 15, fn. 9) pointed to the invalidity of comparisons based upon the ten most populous counties, which comparisons Appellees persist in making. If reapportionment is carried out under the present formula, the six full-ratio counties (Kings, Queens, New York, Bronx, Nassau and Erie) having 59% of the population will get 48% of the Assembly seats and 46% of the Senate seats. Thus, a clear majority; almost three-fifths of the state population, will be represented by a minority in both houses of the legislature.

Even if one uses the ten counties selected on some basis of classification deemed relevant by Appellees, these counties will get 65% of the Senate seats and 61% of the Assembly seats, as Appellees correctly noted (Motion, p. 10). But, these counties have 74% of the citizen population. The mere fact that they will have more than a majority of the seats does not mean that they are not under-represented.

Moreover, it is unrealistic to attempt any statistical analysis of the malapportionment of this state without recognizing the fact that malapportionment has had a decisive effect in reducing the extent to which the distribution of seats in the legislature reflects the distribution of votes for the political parties on a state-wide basis. As a not accidental consequence of the malapportionment of New York, one finds that the following occurs:

In the 1960 Senatorial election, 48.9% of the votes were cast for candidates of the Republican party but 56.9% of the Senate seats went to candidates of that party. In the 1958 Senate election, 49.7% of the votes went to Republican candidates, but 58.6% of the Senate seats went to candidates of that party. In the 1960 election for the Assembly, 48.2% of the votes were cast for Republican candidates but ~~56.4%~~ 56.0% of the seats went to candidates of that party. In the 1958 Assembly election, 49.8% of the votes were cast for Republican candidates but 61.3% of the seats went to candidates of that party.[1]

It is a fact of political life in New York that, as a consequence of the formula contained in the State Constitu-

1. See, *The Politics of Reapportionment*, The Atherton Press, Chapter 13, "New York: Constitutionally Republican" by Gus Tyler and David J. Wells.

tion, one political party has been able to perpetuate its political control of the state even though its candidates frequently receive a minority of the votes.

In the recently published study, "State Legislative Redistricting"[2], Professors Paul T. David and Ralph Eisenberg state (at page 17) that, in their opinion, in a legislature where less than 45% of the population have the power to elect the majority in one house of the legislature "it can be suspected there is substantial room for improvement in achieving reasonable equality of representation in the districting plan".

As noted in our Jurisdictional Statement (pp. 16-17), if a reapportionment were carried out under the existing constitutional formula Assemblymen representing 37.5% of the citizens would constitute a majority in the Assembly and Senators representing no more than 38.1% of the citizens would constitute a majority in the Senate. Obviously, these variations go beyond the realm of "mathematical nicety".

Appellees further state that the people of the state have "refused to convene a constitutional convention—in which the urban majority would have been in overwhelming control—despite the fact that advocates of a new apportionment system, including the then-governor of the State, urged them to do so" (Motion, p. 7). Appellees also assert that the apportionment formula "was squarely at issue in the 1957 election" (Motion, pp. 5, 10).

Under Article XIX, §2 of the New York Constitution, each Senatorial district elects three delegates and fifteen delegates are elected at large to a constitutional conven-

2. Public Administration Service, University of Virginia, September 10, 1962.

tion. Under this formula, if a convention had been approved in 1957, the six most-heavily populated, most under-represented counties, with 59% of the population, would have had 90 convention seats out of 189, or 47% of the total. Even if, in addition, all of the fifteen state-wide delegates had been elected from these counties, they could not possibly have had "overwhelming control".

Moreover, it is incorrect to state that the apportionment formula was "squarely at issue" in the 1957 referendum on a convention. Many issues other than apportionment were placed before the electorate and the referendum itself did not specifically refer to the apportionment issue. While it is true, as the court below noted (J. St., App. A, p. 21) and Appellees have emphasized (Motion, p. 5), that the then Governor urged a favorable vote on the convention to enable apportionment reform, it is also true that a leading political spokesman for the other political party opposed a convention on other grounds. Former Governor Thomas E. Dewey urged defeat of the proposed constitutional convention on the grounds, not that revision was not needed, but that such a convention was an "outmoded, unwieldy instrument" for achieving revision and would "waste" at least $5,000,000. He urged that constitutional reform could better be achieved by means of a commission empowered to propose specific revisions of the constitution[3]. (In fact, after defeat of the referendum calling for a constitutional convention, such a commission was killed by the legislature when it became apparent that suggestions for changing the apportionment formula would be made by that commission) (R. 55-56). Former Governor Dewey also opposed the convention on

3. New York World Telegram and Sun, October 31, 1957, p. 29.

the grounds that it would have been used to promote annexation to New York City of Nassau and Westchester counties and to raise the limits on real estate taxes. In this regard, it is interesting to note that Nassau county, despite its severe under-representation, voted 57% against holding a convention.[4] It is just as reasonable to assume that the "no" votes in Nassau were motivated by fear of annexation, as it is to assume that they were based upon opposition to apportionment reform.

Appellants reassert the fact that no effective political remedy exists in New York State and respectfully direct this Court's attention to the fact that Appellees have made no attempt to explain why the decision below is not in conflict with that in the *Scholle* case in which relief was granted, despite the availability of initiative and referendum in Michigan, a form of relief unavailable in New York. (See J. St., p. 14.)

Finally, we ask the Court to contrast, on the one hand, Appellees' contention (Motion, p. 21) that the district court properly excluded evidence offered to show that the legislature in fact discriminates against the under-represented areas in allocating tax revenues and distributing benefits, with the position taken, on the other hand, by the petitioner in *Beadle* v. *Scholle*, No. 517, Oct. Term 1962, in which an alleged weakness in that plaintiff's case is said to be the absence of any allegation or showing that the legislature elected pursuant to the there challenged formula had failed to respond adequately to the

4. N. Y. State Legislative Manual 1958, pp. 1077-1078. The six most heavily-populated counties voted 56% in favor of a convention. The ten counties of which Appellees speak voted 53% in favor of a convention.

needs of the urban community (Petition, No. 517, p. 8). Obviously, the positions are in conflict.

CONCLUSION

It is respectfully submitted that this Court should deny Appellees' Motion to Dismiss or Affirm and should note probable jurisdiction of this Appeal.

Respectfully submitted,

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November 1962